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ONLINE MEDICAL NEGLIGENCE UNDER CONSUMER PROTECTION ACT, 2019

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I. ABSTRACT

The modern era has been designated as the era of consumers. The consumer is the driving force behind all marketing efforts in addition to being the object of their mind and heart. As consumers, we deal with a lot of issues like subpar products, inadequate services, adulterated food, fake goods, hoarding, the use of fractional weights and misleading weights, delayed deliveries, variations in the contents of the pack, subpar after-sale service, deceptive advertising, hidden price components, price discrimination, etc. These issues develop as a result of dishonest sellers taking unfair advantage of customers' inexperience and weakness. With the developing world technology is reaching its peak and so are the provisions and availability for the consumers. By far technology has covered almost all the sectors to grant access to the consumers. Amongst which the most debated be the 'health sector'. There are various platforms that provide for online health care consultations and treatments. Platforms like Practo, Healthians, DocsApp, PharEasy and many more are available. Hence with its access, the problems faced by the consumers are also new and complex for judiciary of the land to decide on.

II. KEYWORDS:

Consumers, Health sector, Goods, Services, Dispute, Online Medical Platforms.

III. INTRODUCTION

Currently, consumerism pre-dominates the Indian market, especially ten years following the process of economic reforms. The market is gradually shifting from one that favors sellers to one that favors buyers. The customer serves as the focal point for all commercial

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activity and is the only one who can be exploited in any way. The corporate world is employing a variety of techniques to make money at the expense of the customer in order to keep up with the rising competition as a result of technological innovation and shifting consumer expectations. Even with the greatest consumer laws and genuine government efforts to protect consumers' interests, exploitation is on the rise. Lack of consumer awareness of their rights and protective measures is the main factor causing this situation. The *Consumer Protection Act (CPA)* is a kind piece of social legislation that guarantees consumer rights protection and dispute resolution. At the district, state, and federal levels, CPA has established a three stage quasi-judicial consumer dispute redressal structure. All goods and services are covered by the Act, with the exception of those intended for resale or other commercial use, those provided for no charge, and those covered by a contract for personal service.

A. RECOGNITION TO CONSUMERS ERA: CONSUMER PROTECTION ACT, 1986

In order to defend the interests of the consumers parliament created the Consumers Protection Act in 1986. This Act marked the establishments of various consumer forums at district, state and central level. These forums act like a disputes solution bodies amongst individual consumer and group. It is 1970s when the consumer disapproval and displeasure with goods and various services came out in a written rather a revolutionary form. India was in grey shades of market due to activities like hoarding, market manipulation due to yet developing country, poor weighing and food adulteration. All these laid to consumer exploitation. It was not just the quality of goods and services that bothered the consumers but also the method of manufacturing. The Act aimed at not just satisfaction of the consumers but also make the correct and essential information to flow in the market and there be fair trade and commerce.

The act provides justice not only for the consumer but also for the manufacturer if the latter is not at the fault. The grievance is addressed and a fast compensation is awarded. All the goods and services under the ambit of public, private or cooperative sectors are

included and can be applied under the Consumers Protection Act. The Act provides with certain rights and responsibilities for the consumers. The rights of the consumers are as mentioned: a consumer has right to choose, wherein they get a variety and there is a practice of competitive and fair market. Right to safety and to be informed: a consumer is to be informed with right details of the product or service in order to make best choice for themselves; this is type of consumer education being provided to them. The consumers have right to be heard to express their thoughts about the product or a service and grievances at the same time is to be heard. As a remedy to the fault the consumers have right to seek compensation for their damage caused. With rights, the Act also states responsibilities for the consumers to perform. A consumer should be able to make a rationale decision and think independently and not influenced by anything in negative aspects. They are responsible for their own speak out of the grievance, as it is responsibility of the consumer to bring their complaint into the notice that there has been an inconvenience to them. Believe that this should be carried out in a just and open manner. The consumers themselves should not be in any deceptive practice.

B. AMENDMENT TO EASE E-CONSUMERS: CONSUMER PROTECTION ACT, 2019

With the world running with and behind technology it is necessary that there is change in the legislative laws for the convenience of the citizens and mark fir justice for contemporary issues. The Act of Consumer Protection of 1986 also needed the change, as the consumers and the way to reach the consumers also links itself to the technological advancements. The contemporary issue is when the e commerce merges with the health sector. In the contemporary world, we see that services through the online platforms are provided, let that be food, shopping, or even health care sector.

Doctors are in association with the online platforms, through which services in form of consultation is provided to the patients (consumers). But a complex question arises when it comes to the deficiency of services by the doctors who are prescribing at online modes. Will the doctor individually be charged for the deficiency or will the platform be charged

for the same? By far there have been no such major cases in which the court had to deal with such a circumstance but it is no far that the court one day will have to face this. Consumer Protection act with regards to the health sector has always been challenging to be addressed by the judiciary of the state.

IV. QUALIFICATION OF HEALTH SECTOR IN THE ACT OF 2019: A LEGAL ANALYSIS

Health sector in India is a much-discussed topic with regards to the contemporary world problems faced by the consumers and the people who avail these services. Problems faced under health sector have varied aspects like inadequate access to the health services. This is a more generalized problem in country like India, in terms of provisions of medical centers in varied areas. Budget always constraints through various sectors and so is the health sector. Preventive care is undervalued. It is in all three powers, legislature, executive and judiciary there are loopholes that are with the concern health sector. Even Supreme Court through its judgment statements states right to health as a fundamental right. But protection of right of a patient cannot be at the cost of the integrity and autonomy of profession. Here is where judiciary has to make justice with respect to the rights of the consumer and integrity of the individual in this profession.

- ***Section 2 of the Consumer Protection Act, 2019***

(5) "complainant" means— (i) a consumer; or (ii) any voluntary consumer association registered under any law for the time being in force; or (iii) the Central Government or any State Government; or (iv) the Central Authority; or (v) one or more consumers, where there are numerous consumers having the same interest; or (vi) in case of death of a consumer, his legal heir or legal representative; or (vii) in case of a consumer being a minor, his parent or legal guardian; [2]

[2] The Consumer Protection Act, 2019, § 2(5), No.35, Acts of Parliament, 2019 (India).

In this scenario, a patient is a consumer, of the services provided by the health sector. The services provided by the doctors. A patient here is a consumer of goods in the form of medicines prescribed to them by the medical assistance they are availing from the medical practitioners.

It is only a consumer of the service who has right to file a complaint under the Consumers Protection Act, 2019.

- ***Section 2 of the Consumer Protection Act, 2019***

(6) "complaint" means any allegation in writing, made by a complainant for obtaining any relief provided by or under this Act, that—

(i) an unfair contract or unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

(ii) the goods bought by him or agreed to be bought by him suffer from one or more defects;

(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from any deficiency; [3]

Under this section the Act explains what a complaint is, it is an allegation in written form. Here as a consumer of health sector, a person can file a complaint against deficiency of service.

- ***Section 2 of the Consumer Protection Act, 2019***

(7) "consumer" means any person who— (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such

[3] The Consumer Protection Act, 2019, § 2(6), No.35, Acts of Parliament, 2019 (India).

person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose. [4]

Here a patient is a person that hires any service for a consideration which has been promised or partly promised.

- ***Section 2 of the Consumers Protection Act, 2019***

(11) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes—

(i) any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and

(ii) deliberate withholding of relevant information by such person to the consumer; [5]

Medical Negligence is a common problem faced in health sector across the country. But this doesn't apply in the similar manner when it comes to online consultation of the patients. For medical negligence, there are three elements present:

- The defendant owes a duty of care to the plaintiff.

[4] The Consumer Protection Act, 2019, § 2(7), No.35, Acts of Parliament, 2019 (India).
[5] The Consumer Protection Act, 2019, § 2(11), No.35, Acts of Parliament, 2019 (India).

- Defendant has breached this duty of care.
- The plaintiff suffers an injury due to this breach.[6]

Every doctor owes a duty towards their patient. Doctor patient relationship is proven to be fiduciary by the court and justified through various cases entertained in various courts throughout. A doctor's duty is to exercise 'a reasonable degree of care'. In simple terms, a doctor does not have to make sure that every individual that comes to them in cured with the illness, rather the doctor has to ensure that all the possibilities in his hands are used to cure the illness and sufferings of the individual.

Medical negligence is considered when a person has a legal duty to treat or prescribe a patient. There has to be a breach of such legal duty. As the consequence of this breach there has to be an injury or damage suffered and proved to the other party. Even the situation where there is absence of medical equipment which is at most important the court will consider it to be the case of medical negligence. Whereas still there are cases in which the justice is given completely on the basis of the facts of the cases. The failure of a surgery and adverse effects of a treatment that were not always avoidable by a reasonable person are not usually regarded as medical malpractice. According to the amendments in the Consumer Protection Act, 'contract of service' and 'contract for service' is interpreted through various court statements and the legislation. This was after the judgment of ***Medical Association v. VP Shantha*** [7] by the Supreme Court.

'Contract of service' relates itself to the master servant relationship. 'Contract for service' is where the parties provide each other with form of service where the other person is bound by the conduct or the directions as mentioned in the contract. Hence medical services which comes under services provided free of cost or personal service will not come under section 2(1) (o) of the Consumer Protection Act, 1986.

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[6] Sahoo Shreya, *Medical Negligence and the liability under the Consumer Protection Act*, IPLEADERS (Apr. 7, 2023, 07: 30 PM), https://blog.ipleaders.in/medical-negligence-liability-consumer-protection-act/
[7] Medical Association v. VP Shantha, 1996 AIR 550, 1995 SCC (6) 651.

- ***Section 2 (1) of Consumers protection act, 1986***

(o) "service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, 6[housing construction], entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;

In cases as such the burden of proof les on the shoulders of the plaintiff that is the patient or the consumer.[8]

It is very important for the parties to know about the fact that when does the liability arise. The liability of the doctor in a case of medical negligence arises at the circumstance that the negligence results in injury as suffered by the patient and not if the patient has suffered injury which is not the result of the negligence. Although it is entirely up to the plaintiff to convince the court that the harm was caused directly by their negligence, the proportions might occasionally shift due to a legal doctrine known as "*res ipsa loquitur.*" This idea is frequently misinterpreted as an evidentiary rule, which it is not. It is a fundamental tenet of tort law. It is the doctor's responsibility to demonstrate how the incident may have happened without negligence when this principle is in play. In the absence of such an explanation, the doctor becomes liable. The doctor is held liable for his own acts except for the certain cases which involve vicarious liability. Such cases are more often that of surgery cases where the doctors are assisted by the junior doctors.

Difference of opinion, unforeseen results, emergency care, known complications can be few of the defenses that can be used in the case of medical negligence.

A. SEEK REDRESSAL:

[8] The Consumer Protection Act, 1986, § 2(1)(o), No.68, Acts of Parliament, 1986 (India).

Under the Consumer Protection Act, there is three tier hierarchies of complaining the grievances and asking for remedy.

- District Consumers Disputes Redressal Commission. (section 28 to section 37 of Consumers Protection Act, 2019)

Section 28. (1) The State Government shall, by notification, establish a District Consumer Disputes Redressal Commission, to be known as the District Commission, in each district of the State: Provided that the State Government may, if it deems fit, establish more than one District Commission in a district. (2) Each District Commission shall consist of— (a) a President; and (b) not less than two and not more than such number of members as may be prescribed, in consultation with the Central Government.[9]

- State Consumers Disputes Redressal Commission. (section 42 to section 52 of Consumers Protection Act, 2019)

Section 42. (1) The State Government shall, by notification, establish a State Consumer Disputes Redressal Commission, to be known as the State Commission, in the State. (2) The State Commission shall ordinarily function at the State capital and perform its functions at such other places as the State Government may in consultation with the State Commission notify in the Official Gazette: Provided that the State Government may, by notification, establish regional benches of the State Commission, at such places, as it deems fit. (3) Each State Commission shall consist of— (a) a President; and (b) not less than four or not more than such number of members as may be prescribed in consultation with the Central Government.[10]

- National Consumers Disputes Redressal Commission. (section 53 of Consumers Protection Act, 2019)

[9] The Consumer Protection Act, 2019, § 28, No.35, Acts of Parliament, 2019 (India).
[10] The Consumer Protection Act, 2019, § 42, No.35, Acts of Parliament, 2019 (India).

> *Section 53.* (1) The Central Government shall, by notification, establish a National Consumer Disputes Redressal Commission, to be known as the National Commission. (2) The National Commission shall ordinarily function at the National Capital Region and perform its functions at such other places as the Central Government may in consultation with the National Commission notify in the Official Gazette: Provided that the Central Government may, by notification, establish regional Benches of the National Commission, at such places, as it deems fit. [11]

The consumer can file their complaint electronically [12]and also serve the notice through electronic means[13] and in addition to this, he/she can opt for hearing or for examination of parties through video conferencing.[14]

B. Legal remedies for medical negligence [15]:

- Medical council of India:

A complainant can file a complaint in the state medical council against the medical practitioner. The remedy for the complaint can be provided in form cancelling or suspending the registration of the doctor or the hospital in effect as according to the facts of the case. No compensation is awarded to the complainant. The complainant is supposed to state all the facts. The accused is supposed to submit their reply within 30 days of the complaint filed. The reply is analyzed by the council and if not satisfied then the council may call both the parties to support their arguments with the evidence and a decision is made thereafter.

- Civil liability under Consumer Forum:

Any patient as a consumer facing deficiency of service through the medical sector can file the case under section 42(11) of the Consumer Protection Act, 2019. The complainant can

[11] The Consumer Protection Act, 2019, § 53, No.35, Acts of Parliament, 2019 (India).
[12] The Consumer Protection Act, 2019, § 35, No.35, Acts of Parliament, 2019 (India).
[13] The Consumer Protection Act, 2019, § 65, No.35, Acts of Parliament, 2019 (India).
[14] The Consumer Protection Act, 2019, § 38(6), No.35, Acts of Parliament, 2019 (India).
[15] LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=b271f61b-9bc7-4d12-9e88-4c058fd8951b (Apr. 8, 2023).

ask for damages under section 69(1) of the Consumer Protection Act, 2019. Complaint is to be filed from 2 years from the date of injury.

- Criminal liability:

In judgments, the court states that when in the matter of medical negligence where it pursues to be a criminal case. The element of '*mens rea*' needs to be proven.

V. JUDGMENTS

The Supreme Court along with the other lower courts of the country has stated various aspects of consumer's protection act in concern with the health sector and medical negligence caused. Through various cases of medical negligence, the court has always stood proving that the negligence of the profession of a doctor is different from that of a negligence of the profession of a driver or someone with such a profession.

- ***Fardon v. Harcourt Rivington***, the court stated the following "If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of reasonable man, then there is no negligence in not having to take extraordinary precautions"[16], through which the court gave a test to see the foresee ability of the damage occurred by 'reasonable man test'.
- Right and privilege to possess written medical record of the patient was given in ***R Raheja v. The Maharashtra Medical Council.***[17] The patient themselves can possess the record or the same can be possessed by their legal heirs.
- *In the case of* ***Vinod Jain v. Santokba Durlabhji Memorial Hospital and Ors***[18]*,* the Supreme court stated that while dealing with cases as such it would be sufficient for the doctor to exercise the skill of an ordinary competent man under similar

[16] Fardon v. Harcourt Rivington, [1932] All ER Rep 81.
[17] Mr. R Raheja v. The Maharashtra Medical Council, AIR 1996 Bom 198.
[18] Vinod Jain v. Santokba Durlabhji Memorial Hospital and Ors., AIR 2019SC 1143.

circumstances even when he has been accredited with a special skill or competence but does not possess the utmost expert skill.

- In the case of ***Achutrao Haribhau Khodwa and Ors. v. The State of Maharashtra***[19] it was stated that if a doctor is performing his duty with care and proper caution then he is not subjected to the liability of any medical negligence. But the same is done with an act of negligence then the doctor is liable for the same.

The guidelines for reasonable 'standard of care' was led in the cases of:

- ***Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole***[20] and ***Chandigarh Clinical Laboratory v. Jagjeet Kaur*** [21] affirmed the conclusions of the District and State commission, according to which the appellant was ordered to pay the plaintiff Rs. 25,000 in compensation plus Rs. 2,000 in costs. The patient received incorrect reports from the appellant laboratory, and the Honorable Commission ruled that the appellant had a "duty of care" to provide the patient with accurate findings. If the appellant failed to exercise due caution, this would constitute medical negligence.
- ***Jagdish Prasad Singh v. Dr. A.K.Chatterjee***[22] ordered the opposing party to pay the complaint Rs. 25,000 as compensation for his mental anguish and physical harassment, along with Rs. 5,000 for legal fees. It was noted that the accused had neglected to take the necessary precautions to accurately disclose the findings in the reports. The standard for proving negligence would not depend on whether the patient suffered harm or not.
- ***Medical Association v. VP Shantha***[23], the court stated that, the ability of a medical professional varies from doctor to doctor, thus it is up to the complainant to show that a doctor was careless in the course of treatment that led to the patient's death.

[19] Achutrao Haribhau Khodwa and Ors. v. The State of Maharashtra, 1996 SCC (2) 634.
[20] Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole, 1969 AIR 128.
[21] Chandigarh Clinical Laboratory v. Jagjeet Kaur, IV (2007) CPJ 157 NC.
[22] Jagdish Prasad Singh v. Dr.A.K.Chatterjee, 2008.
[23] Medical Association v. VP Shantha 1996 AIR 550, 1995 SCC (6) 651.

A judge can only convict a doctor of a crime if it can be demonstrated that he failed to provide patients with acceptable medical care.

- ***Mam Chand v. Dr. GS Mangat of Mangat Hospital***. "Allegation of medical negligence is a serious issue and it is for the person who sets up the case to prove negligence based on material on record or by way of evidence".[24] The complaint of medical negligence was dismissed because the applicant failed to establish and prove any instance of medical negligence.
- ***Sardool Singh v. Muni Lal Chopra and Another***.[25] In this case, the complainant has not presented any expert witnesses to demonstrate that the operations were performed incorrectly. One of the accepted forms of treatment for bone fractures is fixing the fractured bones with plates. If the opposing party used the aforementioned approach but the plate cracked later, the doctor cannot be held liable for negligence. In this instance, neither the surgical wounds nor any other complications developed. The surgeon's negligence in carrying out the operation cannot be blamed for the plate breaking about six months after it was implanted. The District Forum correctly determined that the complainant had not made his case.
- ***Nirmalendu Paul v. Dr. P.K. Bakshi and Anr.*** [26] To support his assertion that the doctor was careless, the complainant does not consult any relevant experts. Despite the unfortunate situation, the complainant must show that the doctor was negligent in order to win this case. We note that there is hardly any credible evidence to support the claim made in the complainant's petition. Given the facts, we are forced to conclude that the Complainant has not proven the charges made against the opposing parties.

[24] Mam Chand v. Dr. GS Mangat of Mangat Hospital. 2004;(I) CPJ 79 (NC).
[25] Sardool Singh v. Muni Lal Chopra and Another, 1999 (I) CPJ 64 (Punjab).
[26]Nirmalendu Paul v. Dr. P.K. Bakshi and Anr., 2000;(III) CPJ 79.

- ***Martin F. D'Souza v. Mohd. Ishfaq.*** [27] The Director of Health Services recommended the Respondent, who had severe renal insufficiency, for a kidney transplant at Mumbai's Nanavati Hospital in March 1991. At that time, the Respondent was looking for a prospective kidney donor while undergoing hem dialysis twice a week. The Respondent visited the Appellant doctor on May 20, 1991, with a high fever, but he declined to be admitted to the hospital notwithstanding the Appellant's advice. The Respondent finally agreed to be taken into the hospital on May 29, 1991, while still having a high temperature, due to his critical condition. On October 6, 1993, the National Consumer Disputes Redressal Commission issued a directive requesting the appointment of a medical expert from the All-India Institute of Medical Sciences, New Delhi (AIIMS), who would review the complaint and provide an objective assessment. Dr. P. Ghosh was proposed by AIIMS and was of the opinion that the medicine Amikacin was properly administered by the appellant as a life-saving intervention. The appellant claims that the aforementioned report further establishes that there was no fault on the appellant's side. The National Commission has determined that the Doctor was careless, though.

VI. CONCLUSION

Certainly, it is true that the recent action could only be successful with customer involvement. Adopting multiple consumer-related laws alone won't be enough to make the pro-consumer movement successful. Consumers can take the following actions to support the consumer movement and that is they should be educated. People need to be informed of their obligations and rights in the workplace. Customer awareness of unethical corporate activities is important. Consumers should use the logos on the goods to check the product's quality before making any purchases. It is advisable to bring currency notes with them after making every transaction at the market. Customers who feel that a business has mistreated them in the marketplace should submit a complaint

[27] Martin F. D'Souza v. Mohd. Ishfaq, 2009;(2) Supreme Court 40.

with the consumer court immediately in good faith and not to mention, should not make ill-use of the same.

And medicine as a profession is very diverse and dynamic making it difficult even for the courts and other redressals to make decisions. In addition, e-commerce makes it more complex. As it is even difficult to refer vicarious liability here. Therefore, not having precedents make the courts interpret it on their own basis according to the facts of the case. Hence clear provisions for the health care provided in physical and online mode services should be mentioned for the ease of the consumer as well as the service provider for addressing the problems under the law.

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